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No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A., INC.

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and the National Association of Manufacturers respectfully submit this brief as *amici curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner Chevron U.S.A., Inc.[1]

[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discrimination in employment. Its membership includes over 350 of the nation's largest private sector employers, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association. NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

All of EEAC's and NAM's members are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

In addition, EEAC's and NAM's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, and many others. Many if not all of these companies have adopted safety-based qualification standards addressing the risks presented by the

work environment. These standards are designed to prevent workers from being injured or killed on the job, or from killing or injuring others, either in the workplace or in the general public. They can—and sometimes will—screen out some individuals with disabilities because of potential hazards formed by the combination of particular aspects of the disability and some factor or factors present at the worksite.

Thus, EEAC's and NAM's members have a direct interest in the issue presented in this case—whether the ADA permits an employer to impose as a qualification standard a requirement that a job candidate be capable of performing the essential functions of a job safely, that is, without facing a risk of serious injury or death. The court below ruled that an employer can never defend against an ADA challenge either by showing that performing the job safely is an "essential function" rendering a particular individual unqualified due to the increased risk posed by his disability, or that the plaintiff, if placed in the job, would impose a "direct threat" to his own health. The Ninth Circuit's interpretation is contrary to the language and spirit of the ADA as well as the decisions of several other circuit courts of appeals.

Because of its interest in the proper application of the ADA, EEAC filed extensive comments in response to the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking on its substantive regulations implementing the employment provisions of the ADA. 56 Fed. Reg. 8578 (Feb. 28, 1991) (codified at 29 C.F.R. Part 1630). EEAC also has participated as *amicus curiae* in the private sector ADA cases in this Court [2] as well as in the instant case below.

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[2] *Toyota Motor Mfg., Inc. v. Williams*, 121 S. Ct. 1600 (2001) (*cert. granted*), *US Airways v. Barnett*, 121 S. Ct. 1600 (2001) (*cert. granted*), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United*

Thus, the *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, the *amici* are well situated to brief the Court on the concerns of the business community and the significance of this case to employers. The *amici* seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

Respondent Mario Echazabal worked for various independent maintenance contractors at a Chevron, U.S.A. refinery in El Segundo, California between 1972 and 1996. Pet. App. 2a. In 1992, Echazabal applied for a job with Chevron at the refinery. *Id.* During the pre-employment medical examination, Dr. Philip Baily, a Chevron in-house physician, determined that Echazabal had "an uncorrectable liver abnormality, and should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problems." Pet. App. 34a. Chevron rescinded its contingent job offer. Pet. App. 2a. Echazabal subsequently was diagnosed with "chronic Hepatitis C, a viral infection characterized by ongoing liver inflammation." Pet. App. 35a.

In 1995, Echazabal again applied for a job with Chevron. Pet. App. 3a. Dr. Baily's successor, Dr. Kenneth McGill, conducted another pre-employment medical examination. Pet. App. 35a. As part of this examination, Dr. McGill reviewed Echazabal's medical records, which revealed no improvement in Echazabal's condition. Pet. App. 35a-36a. Dr. McGill also reviewed the written "job summaries" which

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Parcel Serv., Inc., 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998).

Chevron prepares for every job, listing the functions of the position and the environmental conditions that will be experienced on the job. The summary for the plant helper job Echazabal sought listed "hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach in the work environment." Pet. App. 36a-37a.

Dr. McGill also spoke and corresponded with Dr. Zelman Weingarten, M.D., Echazabal's own physician. Dr. Weingarten told Dr. McGill that Echazabal "should not be exposed" to the substances in the refinery. Pet. App. 37a.

In addition, Dr. McGill reviewed Echazabal's medical history, including recent exposures in the refinery. Pet. App. 37a-38a. As a result, "Dr. McGill came to the conclusion that the hydrocarbons, chemicals, and solvents to which Echazabal would be exposed working as a plant helper in the coker unit would be dangerous to his health, or would aggravate his chronic liver condition." Pet. App. 38a. Dr. McGill reviewed his conclusions with Chevron's Medical Director, who agreed. *Id.*

Dr. McGill then reported to William Saner, Chevron Personnel Director, his opinion and that of Echazabal's own physician that Echazabal should not be exposed to liver toxic chemicals. Saner reviewed the same written job summaries as had Dr. McGill. Based on this information and his own knowledge of the job, Saner decided to withdraw the contingent job offer that had been made to Echazabal. Pet. App. 38a-39a.

Chevron notified Echazabal that it was withdrawing his job offer, and also asked Irwin Industries, the contractor that employed Echazabal, to remove him from the position in which he was working in Chevron's refinery, due to the chemical exposure. Pet. App. 39a. Irwin did so, and sent Echazabal to the Long Beach Medical Clinic for evaluation.

Pet. App. 40a. There, Dr. Brian Tang, who holds a board certification in occupational medicine and teaches occupational medicine at the University of Southern California Medical School, concluded that "exposure to liver toxins would harm and probably kill Echazabal." *Id.*

Echazabal sued Chevron and Irwin. The district court below granted summary judgment in favor of Chevron on Echazabal's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the California Fair Employment and Housing Act, Cal. Gov't Code § 12940, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Pet. App. 32a-57a.

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision. Pet. App. 1a-29a. In a 2-1 decision, the Ninth Circuit ruled that Chevron could not defend its decision on the basis that Echazabal would be at great risk to his personal safety if it placed him in the job, nor could the company consider him unqualified for the job on that account. In dissent, Judge Trott called the majority's decision "Pickwickian," Pet. App. 23a, and "bizarre." Pet. App. 21a.

Chevron sought review by this Court, which was granted on October 29, 2001.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, which prohibits discrimination in employment against a *qualified* individual with a disability, permits an employer to exclude as unqualified an individual whose medical condition would place him at risk should he encounter the hazards presented on the job. Being able to perform a job without being seriously injured or killed may be the most basic necessary job qualification. *Cf. Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Webb*

v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991 (7th Cir. 2000); *Reed v. Heil Co.*, 206 F.3d 1055 (11th Cir. 2000).

Accordingly, the ADA provides explicitly for the use of qualification standards and selection criteria that are "job-related" and "consistent with business necessity" even if they tend to screen out an individual with a disability. 42 U.S.C. §§ 12112(b)(6), 12113(a). Such qualification standards necessarily must include safety-based standards designed to protect the health of the individual employee, as well as others in the workplace and the general public. Thus, the Ninth Circuit's holding, that the employer has to place an at-risk employee in a job even though doing so contravenes its own safety standards and medical advice, is contrary both to the law and to common sense.

The statute also provides that an employer's qualification standards may include a requirement that an individual not pose a direct threat to others in the workplace. 42 U.S.C. § 12113(b). The Equal Employment Opportunity Commission's regulations interpreting the ADA make this analysis applicable not only to threats to others, but to threats to the individual as well. 29 C.F.R. § 1630.2(r). The agency's administrative interpretation making an individualized "direct threat" analysis the only way to justify a safety standard overreaches the statute, however.

As a practical matter, employers have a vested interest in protecting the health and safety of their employees. Beyond the fundamental considerations of decency and responsibility in not willingly placing another human being at risk, a company has a significant business interest in protecting its "workforce capital" in which it has invested considerable time and expense.

ARGUMENT

THE ADA PERMITS EMPLOYERS TO USE SAFETY-BASED, JOB-RELATED QUALIFICATION STANDARDS EVEN IF THEY SCREEN OUT INDIVIDUALS WITH DISABILITIES

A. The Capacity To Perform a Job Without Incurring Serious Injury or Death Is a Fundamental Qualification

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, prohibits discrimination in employment against a "*qualified* individual with a disability" because of the disability. 42 U.S.C. § 12112(a) (emphasis added). It defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added).[3] The statute is explicit that the employer's judgment as to what job functions are essential *must* be considered in making this determination. *Id.*

[3] The ADA does not define the term "essential functions." The concept derives from the regulations issued under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See, e.g.*, 45 C.F.R. § 84.3(k)(1). When the Department of Health and Human Services issued the Section 504 regulations, it explained that this term was used to emphasize that "handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a *marginal* relationship to a particular job." 45 C.F.R. pt. 84, App. A(a)(5) (emphasis added). The Committee Reports on the ADA similarly characterize "essential" functions as being "non-marginal." S. Rep. No. 101-116, at 26 (1989) (Senate Labor Committee); H.R. Rep. No. 101-485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 337 (Education and Labor Committee); H.R. Rep. No. 101-485, pt. 3, at 33 (1999), *reprinted in* 1990 U.S.C.C.A.N. at 455-56 (House Judiciary Committee).

Perhaps the most elemental qualification for a job is being able to perform its essential functions, whatever they may be, without seriously injuring or killing oneself. An individual may have the physical capabilities to do a job's tasks yet still not be "qualified" for the job, because the doing would be his undoing. *See, e.g., Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 807-09 (5th Cir. 1997) (holding that employee who could not perform the essential function of carrying materials into a shop area because the proximity to welding equipment could cause electromagnetic interference with his pacemaker was not "qualified" for the job); *Webb v. Clyde L. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991, 999 (7th Cir. 2000) (holding that psychologist who could not perform essential function of interacting with contagious and/or violent patients because of risk of injury due to his asthma, osteoporosis and weakened immune system was not "qualified"); *Reed v. Heil Co.*, 206 F.3d 1055, 1063 (11th Cir. 2000) (holding that a plaintiff with a back condition could not perform essential functions of his job, in part because "test-driving the garbage trucks would painfully aggravate [his] back."). In each of these cases, the employee was physically capable, in the most basic sense, of doing the job in question, but could not as a practical matter do it safely because of the effect on his medical condition. *Cf. Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000) (upholding summary judgment for employer who discharged front loader operator with sleep apnea, noting that "an employee who is less than fully alert could harm himself and others if he is operating a front loader or many other kinds of heavy industrial equipment."). This is true even where the individual himself is willing to endure the pain and suffer the risk involved. *See, e.g., Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 602 (7th Cir. 1999) (holding employee unqualified despite his "self-destructive wish to return to this particular job. . . .").

The ADA's legislative history confirms this point. In its discussion of post-offer, pre-employment medical examinations, the Report of the House Education and Labor Committee clarifies that a candidate could be disqualified on the basis of potential future injury if the examining physician found that there was a "high probability of substantial harm" if the candidate performed the job in question. H.R. Rep. No. 101-485, pt. 2, at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 355.[4]

For this reason, the Ninth Circuit's reliance on this Court's decisions in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and *International Union, UAW, v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), both of which involved challenges under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, as amended, to broad-based rules disqualifying women from employment, is greatly misplaced. The Ninth Circuit read both cases as creating a federally-protected right for "all individuals to decide for themselves whether to put their own health and safety at risk," describing it as a type of "freedom of choice." Pet. App. 10a.

The Ninth Circuit erroneously confused general, speculative risks with specific, predictable ones. *Dothard* and *Johnson Controls* both involved comprehensive general rules excluding all, or nearly all, women.[5] If the instant case involved a rule disqualifying all individuals with disabilities from working at the refinery, then *Dothard* and *Johnson*

[4] Of course, the candidate could not be rejected if reasonable accommodation could avert the harm without undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). But ignoring the danger would be neither reasonable nor an accommodation.

[5] Indeed, even if *Dothard* is read as confirming a woman's general right to choose a potentially dangerous career, it ruled that women *could* be excluded from jobs as prison guards in "contact" positions because of "a substantial security problem, directly linked to the sex of the prison guard." 433 U.S. at 336.

Controls likely would be analogous. But safety standards such as the one in question here are far more narrowly drawn, excluding only those workers whose particular sensitivities make exposure to liver-toxic chemicals a substantial risk. Thus, Title VII's prohibition against broad gender-based exclusionary rules that cannot be justified as a bona fide occupational qualification has no bearing on the case at bar.

B. The Statutory Language Explicitly Permits Employers To Use "Job-Related" Qualification Standards, Which Necessarily Include Safety-Based Standards

Employer safety standards designed to preserve the health and safety of the individual employee, other employees and the public are necessarily "qualification standards" under the ADA. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) ("By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria"). Indeed, the ADA states *twice* that employers may use qualification standards and other selection criteria that are "job-related" and "consistent with business necessity" even if they tend to screen out individuals with disabilities.

First, Section 102(b) of the ADA, which defines the term "discriminate" as used in the general prohibition of Section 102(a), states in relevant part that:

> (b) CONSTRUCTION—As used in subsection (a), the term "discriminate" includes—
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.*

42 U.S.C. § 12112(b)(6) (emphasis added). Thus, the very statutory provision raising the possibility that a qualification

standard or selection criterion might discriminate on the basis of disability also expressly recognizes the legitimacy of such a standard or criterion if it "*is shown to be job-related for the position in question and is consistent with business necessity.*" *Id.*

Second, the statute provides a defense in much the same terms, stating:

> IN GENERAL—It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability *has been shown to be job-related and consistent with business necessity*, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a) (emphasis added). The inclusion of this defense makes it doubly clear that qualification standards or selection criteria that are "job-related" and "consistent with business necessity" are permissible under the ADA even if they screen out individuals with disabilities.

The legislative history of the ADA confirms that "business necessity" can justify qualification standards that establish physical job criteria. Both congressional committees with direct authority over this part of the legislation, the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor, made this point.

> Under this legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity. Thus, for example, an employer can adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is necessary to an individual's ability to perform the essential function in question.

S. Rep. No. 101-116, at 27 (1989). *See also* H.R. Rep. No. 101-485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338. Both committees explained this provision as a "requirement that job criteria actually measure ability required by the job" to guard against employment decisions based on "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities . . . ." S. Rep. No. 101-116, at 37 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353. They explained:

> If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do an essential function of the job. *If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation.*

S. Rep. No. 101-116, at 37-38 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353-54 (emphasis added).[6] *See also* H.R. Rep. No. 101-485, pt. 3, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 454-55.

Importantly, the ADA's legislative history also confirms that Congress intended for safety-based medical standards to be evaluated under the "business necessity" rule. As the House Committee on the Judiciary stated, "The Committee does not intend for this Act to override any legitimate medical standards established by federal, state or local law, *or by employers* for applicants for safety or security sensitive positions, if the medical standards are consistent with [the

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[6] The explanation continues that "the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion." *Id.* The Committees, did not, however, suggest any standards for how such a criterion could or should be identified or evaluated.

ADA]." H.R. Rep. No. 101-485, pt. 3, at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 466 (emphasis added). *See also* H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57; H.R. Conf. Rep. No. 101-596, at 59-60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 567-69. Indeed, the House Labor Committee focused specifically on safety-sensitive positions in explaining when medical examinations for employees might be "job-related" and "consistent with business necessity," stating:

> Section 102(c)(4) prohibits medical exams of employees unless job-related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, even though a medical certificate might not be required by law.

H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57. Similarly, the Conference Report explains:

> [I]n certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet *the employer's criteria* for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

H.R. Conf. Rep. No. 101-596, at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 568 (emphasis added). Thus, the legislative history supports the appropriateness of the "business necessity" defense to respond to a challenge to a safety-based physical standard.

The Equal Employment Opportunity Commission's regulations interpreting the ADA define "qualification standards" appropriately as "the personal and professional attributes including the skill, experience, education, physical, medical, *safety* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (2001) (emphasis added). Similarly, the agency's Interpretive Guidance regarding the statute's use of the term "qualification standards" states that "[t]his provision is applicable to all types of selection criteria, including *safety requirements* . . . ." 29 C.F.R. pt. 1630, App. § 1630.10 (2001) (emphasis added).

Similarly, in conforming to the ADA its regulations interpreting § 503 of the Rehabilitation Act of 1973, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) also indicated its view that safety is a "business necessity" issue. When it proposed deleting specific language stating that physical and mental job qualification standards must be "consistent with safe performance of the job," the agency explained that "OFCCP has determined it unnecessary to incorporate the reference to 'safe performance' in the proposal because that concept is

subsumed by the concept of business necessity." 57 Fed. Reg. 48,084, 48,098 (October 21, 1992).[7]

Accordingly, there appears to be a consistent, common-sense interpretation among both the congressional committees that passed on the ADA and the federal agencies that have interpreted it that safety-based qualification standards are appropriate selection criteria.

C. The Existence of the "Direct Threat" Defense Does Not Preclude the Application of Job-Related Safety Standards Designed To Prevent Harm to Individual Employees

1. The Ninth Circuit's inverted reading of the two "qualification standards" defenses is incorrect.

As noted, the ADA creates an explicit defense for employers who use "qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). As a subset to this defense, the statute also provides that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

Congress added this provision to codify a point this Court made in *School Board of Nassau County v. Arline*, that "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. 273, 287 n.16 (1987). *See* S. Rep. No. 101-116, at 40 (1989); H.R. Rep. No. 101-485, pt. 2, at 76 (1990), *reprinted in* 1990

[7] The revised regulations adopted by the agency reflect this change. 61 Fed. Reg. 19,336, 19,538 (May 1, 1996) (codified as 41 C.F.R. § 60-741.44(c)) (formerly 41 C.F.R. § 60-741.6(c)).

U.S.C.C.A.N. at 358-59; H.R. Rep. No. 101-485, pt. 3, at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 468.[8] The defense thus addresses situations such as that presented in *Arline*, where an individual meets all of the employer's *other* qualification standards but still presents a risk to others. H.R. Rep. No. 101-485, pt. 3 at 45-46, *reprinted in* 1990 U.S.C.C.A.N. at 468-69.

Thus, under the plain language of § 12113(a), an employer may use any qualification standard that is "job-related and consistent with business necessity" even if it screens out an individual with a disability. 42 U.S.C. § 12113(a). One such standard may be that the individual not "pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). To use the "direct threat" provision, an employer must meet its specified threshold of proof, drawn directly from *Arline*—that placing the individual in the job would present "a significant risk to the health or safety of others, that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

The Ninth Circuit mistakenly read these two provisions as mutually exclusive, inferring that because the "direct threat" defense refers to threats to *others*, the broader language dealing with qualification standards cannot be utilized to address other safety risks, such as a risk to the individual him- or herself. This reading is simply wrong, for two reasons.

First, § 12113(b) states unequivocally that "the term 'qualification standards' may *include* a requirement that an individual shall not pose a direct threat . . ."; it says nothing about what the term does *not* include. 42 U.S.C. § 12113(b) (emphasis added).

[8] In conference, the provision was expanded to cover all threats to others in the workplace. H.R. Conf. Rep. No. 101-596, at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 569.

Accordingly, the existence of a specific "direct threat" defense applicable to risks to others does not preclude an employer from instituting and applying safety-based qualification standards that address situations in which an individual's medical condition, when combined with conditions on the job, poses a "significant risk" to the individual's health or safety. In *Moses v. American Nonwovens, Inc.*, for example, the Eleventh Circuit concluded that an individual with epilepsy was not qualified for his job as a product inspector in a manufacturing plant because "[e]ach of Moses's assigned tasks presented grave risks to an employee with a seizure disorder." 97 F.3d 446, 447 (11th Cir. 1996). *See also LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998) (holding that retaining an employee with epilepsy in his job as a line cook "would have posed a risk of harm to himself and others . . ."). In *Turco v. Hoechst Celanese Corporation*, 101 F.3d 1090 (5th Cir. 1996), the court mentioned the "direct threat" provision when holding that the plaintiff, who testified that his diabetes, among other things, caused occasional loss of concentration so severe that he could not remember his name, was "unqualified due to the safety risk that he imposes upon himself and others" at the chemical manufacturing plant where he worked. *Id.* at 1094. Noting that the job required "work with complicated machinery and dangerous chemicals," the Fifth Circuit described the situation as "a walking time bomb and woe unto the employer that places an employee in that position." *Id.*

Second, the Ninth Circuit's version simply defies common sense. 42 U.S.C. § 12113(b) mentions only "a direct threat to the health or safety of *other individuals in the workplace* . . ." (emphasis added); it says nothing about risks to others *outside* the workplace, *e.g.*, the general public. The Ninth Circuit's misplaced "*expressio unius est exclusio alterius*" analysis thus would foreclose not only those qualification standards designed to guard against risks to the individual, but those intended to prevent risks to the public as well.

This cannot be. As noted above, the ADA's legislative history is replete with references to the proper use of job-related standards designed to protect the safety and security of the general public. Congress unmistakably intended for employers to use properly-crafted job qualifications to ensure that the public would not be placed at risk. Indeed, if the ADA were read to preclude employers from imposing these requirements, the potential impact on public safety would be significant, to say nothing of the consequent damage to the employer's business, such as potential tort liability and loss of public favor.

2. The EEOC's regulation applying the "direct threat" analysis to all safety-related issues incorrectly contradicts the statutory language governing the use of more broadly crafted safety standards

One of the EEOC's regulations interpreting the ADA describes the "direct threat" defense as applicable to all safety-related medical standards, regardless of whether the hazard is to the individual's own safety or that of others. 29 C.F.R. § 1630.2(r) (2001). The regulation does not explicitly present the "direct threat" defense as the *sole* method for defending a safety standard, but the agency's interpretations do.[9] Despite its own regulatory language quoted above, listing "safety" as a basis for a qualification standard generally, 29 C.F.R. § 1630.2(q) (2001), the EEOC's Interpretive Guidance issued in conjunction with its regulations expresses the view that the "direct threat" provision is the *only* avenue for an employer to show that a

[9] Indeed, if the agency viewed it as merely an option, it would not be an unreasonable one. As shown above, an employer who shows that placing a particular person with a disability into a particular position would impose a "direct threat" to that person's health certainly has shown that the person is not qualified for the job. The EEOC does not see it as optional, however.

safety-related qualification standard is "job-related and consistent with business necessity." 29 C.F.R. pt. 1630, App. §§ 1630.15(b) and (c) (2001).[10] *See also Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (citing Brief for United States *et al.* as *Amici Curiae*).

As this Court observed in *Albertson's,* since the EEOC's construction may place a greater burden on safety standards than, for example, a typing test, there is a very real question whether the agency's interpretation is valid. *See* 527 U.S. at 569 n.15 (noting that "it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one"). The Fifth Circuit already has conclusively ruled the EEOC's construction *unsound*. *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000) (holding that across-the-board safety based qualification standards need not be subjected to the "direct threat" analysis). As shown above, and as the Fifth Circuit ruled in *Exxon*, a general safety-based qualification standard is properly analyzed under 42 U.S.C. § 12113(a), while "[t]he direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard." 203 F.3d at 875.

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[10] Although the Interpretive Guidance was published for notice and comment at the same time as the EEOC's regulations interpreting Title I of the ADA, it is explicitly labeled "Interpretive Guidance" and therefore is not subject to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").

D. Public Policy Dictates That Employers Be Permitted To Develop and Apply Adequate Safety Standards

Employers must be allowed to develop and apply safety standards to determine if an employee is qualified. In today's workplace, health and safety on the job is a top priority. The Occupational Safety and Health Act of 1970 requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees [and to] comply with occupational safety and health standards promulgated under this [Act]." 29 U.S.C. § 654(a). In this safety-conscious atmosphere, an employer simply cannot assign a person to a job knowing that serious injury or death is the likely result. In many work environments, there will be factors present that, while posing no particular risk to healthy employees, present a grave danger to someone with a specific medical condition. Therefore, when considering whether an employee or applicant is "qualified' to perform a job, any reasonable employer will consider, where appropriate, the effect of hazards posed by the combination of the individual's particular sensitivities and likely exposures on the job.

It simply does not make sense to ignore a medically-established prediction of future harm merely because the individual is willing to risk his or her health. Indeed, the basic purposes of the ADA proceed from the premise that it is in society's interest to make use of all human resources. Allowing individuals to endanger their health—and future role as productive citizens—by allowing them to make incautious judgments regarding what they can and cannot do in the face of contrary expert medical opinion, would contradict this premise directly. Recognizing that injuries impose a cost on society, it makes sense not to so squander our resources. Many states have reached a similar conclu-

sion, adopting laws requiring motorcyclists to wear helmets and automobile drivers and passengers to wear seat belts.

Employers know this already. In addition to fundamental human reasons for not wanting their employees to be hurt, employers have a considerable business obligation to protect their valuable workforce capital. A safer workforce is a more efficient and productive one and, ultimately, more profitable.

Accordingly, keeping their workers alive and safe is the highest priority for conscientious businesses today. Besides the human price, each workplace injury costs the employer a significant amount in lost productivity as well as the time and expense of recruiting, placing, and training a replacement. For example, one safety-conscious construction firm, whose lost-time injury rate was one in 5,000,000 hours, well below the national rate of 9 in 200,000 hours, reported that "the vast majority of [its] projects come in at least 10 percent ahead of schedule and under budget, much of it a direct result of the company's stellar safety performance. Since 1997, the firm has saved $6.9 million as a result of cost underruns." William Atkinson, *On-the-job safety starts at the top*, Business & Health (Sept. 1999).

For all of these reasons, businesses proudly count and display the number of injury-free workdays at a site. Many place enormous emphasis on safety incentive awards. The typical American workplace today displays a gallery of safety placards—not only those mandated by regulatory agencies, but safety reminders that convey the commitment of the employer itself, such as "Safety *is* our business."

While some individuals may be courageous or reckless enough to ignore a doctor's warning, the employee is not the only one with a stake in the matter. Employers must take preventive measures to ensure that employees are able to perform the essential functions of their jobs in a safe manner--that is, without being killed or injured because of an

increased risk formed by the juxtaposition of on-the-job hazards and the employee's own medical condition. An employer that fails to do so will have a difficult time convincing anyone, be it a jury or the Occupational Safety and Health Administration, that it should not be accountable because it was fulfilling its obligation under the ADA. While compliance with the ADA, as a federal law, may in theory preempt other claims, once an accident has occurred, it will be difficult for an employer to justify its actions where, as here, consistent medical advice from both the employer's and the employee's physicians counseled against placing the individual in the job.

It is difficult to believe that Congress intended the ADA to discourage the development and use of safety standards in the workplace. The Ninth Circuit's ruling that employers cannot establish safety as a qualification standard achieves just such a result.

As Judge Trott said in his dissenting opinion, "the majority's holding leads to absurd results." Pet. App. 23a. To the extent that it could force employers to place individuals with disabilities in positions they cannot perform safely, the results could be more than just absurd—they could be tragic.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and National Association of Manufacturers respectfully submit that the decision below should be reversed.

Respectfully submitted,

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